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Supreme Court, U.S.
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No. :

In the

Supreme Court of the United States

October Term, 2002

DORA FRIDMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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28 pp

QUESTIONS PRESENTED

1. Was the Government guilty of misconduct for convicting a fifty four year old female engineer, without any prior record, for possession of heroin with intent to distribute, based upon a Federal Express delivery of 634.5 ounces of heroin, hidden in artifacts, on an argument by the Government that unidentified persons she telephoned in Lynn, Massachusetts were her distributors, when they were actually her cousins, who had emigrated to this country from Moscow, one month earlier?

2. Was defendant deprived of her Constitutional right to effective aid of counsel, where defense counsel failed to produce her cousins in Lynn, Massachusetts to prove that they were not her drug distributors, as claimed by the Government and delivered a confused summation, that inadvertantly pointed to the guilt of his own client?

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SUPREME COURT OF THE UNITED STATES

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JURISDICTION

Jurisdiction is hereby invoked pursuant to 28 U.S.C. 1254 from the judgment of the United States Court of Appeals, entered the 24th day of April, 2002, petition for rehearing denied, the 27th day of September, 2002, affirming the order, of May 17, 2001 of the United States District Court for the Eastern District of New York (Raggi, J), denying petitioner's motion denying petitioner's motion brought pursuant to 28 U.S.C. 2255 to vacate the judgment of conviction entered against her on the 21st day of June, 2002, sentencing her to a term of seventy two months incarceration and five years supervised release.

STATEMENT OF THE CASE

On the 20th day of August, 1988, in Portland, Oregon, a U.S. Customs Agent examined four Federal Express packages sent from Bangkock, Thailand, by a person named "Gin Freeman", The addressee of the package was Alex Shapiro of 2940 West 21st Street, Brooklyn, New York, with telephone number, 718-372-5168.

Inside the packages were artifacts, a cloisonne bird base and a metal sword scabbard, within which were hidden 634.5 grams of heroin. Absolutely no investigation was made by the Government as to the identity of the person who sent the packages and who they were intended for.

Not a scintilla of evidence was offered whether the Oregon search was conducted pursuant to a tip and defense counsel, Frank A. Lopez, never made any effort, pretrial or during trial, to discover the cause for the original examination of the Federal Express packages in. Common sense would dictate that such information could lead to discovery of the intended recipient of the contraband, rather than for the Government to take the indolent way out, and charge any person who would answer the doorbell and accept take delivery.

Residing in the apartment at the Brooklyn address, was Dora Fridman, a fifty four year old Russian immigrant, employed as an engineer. She resided there with her husband, her son and her mother- in-law and father-in-law, ninety years of age. Her son, a young man in his twenties, was traveling abroad in Asia at the time of the delivery.

August 20, 1988 telephone toll records revealed that phone calls were made from the Brooklyn phone number on the Federal Express packages, to India and to Lynn, Massachussets. The telephone records also disclosed many phone calls to and

collect calls from Thailand in the preceding weeks. Not a scintilla of evidence was afforded to identify of the person making of receiving the phone calls nor the content thereof. For all that appears in the record, they were made by Ms. Fridman's husband or by her ninety year old father-in-law. There is not a scintilla of evidence in the record as to who made the phone calls or to whom they were made, let alone any hint as to the content.

Drug Enforcement Special Agent Michael Guardino and Customs Agent Joseph Lazzara decided to make a controlled delivery, posing as Federal Express deliverymen. On the 23rd day of August, 1988, Guardino telephoned the phone number on the label, which was answered by Dora Fridman, The agents told her that they had a package for Alex Shapiro. She asked if she could accept it on behalf of Shapiro. Inside a package, was an audio frequency device, that would alert the agents when the package would be opened. Delivery was arranged for the following day.

According to telephone records, within two hours, telephone calls from the Brooklyn phone number were made to Lynn and Nahant, Massachusetts. No evidence was ever presented as to the identity of the caller or the persons receiving the calls. Indeed, no evidence was even presented, as to the identity of the persons in whose names the Massachusetts phones were list. No evidence was presented as to the persons in Lynn and Nahant, who had received the calls, despite the resources of the Government to investigate. Nor was any evidence presented as to the content of the phone calls.

Later that day, Ms. Fridman and a male went to the office of Edward Paul, a notary, public. The male signed a document that was notarized, authorizing Ms. Fridman to accept delivery of the Federal Express package.

The following day, August 24, 1988, Guardino and

Lazzara, posing as Federal Express employees, delivered the packages and she presented the authorization from Mr. Shapiro.

Telephone records reflect calls from the Brooklyn number to Ms. Fridman's husband at his service station in Valley Stream and two calls were made to India. When the signal went off that she had opened the package, agents made a forced entry into the apartment. They arrested Ms. Fridman and searched her son's room where they discovered dirty needles, a scale, a water pipe, used to smoke Marijuana and hashish and cutting agents, to wit, procaine, quinine hydrochloride and lactose, the type of products that an addict would have, not a distributor. They were also the type of products that a person unfamiliar with drugs, would know nothing about. What was discovered was that Ms. Fridman's son was addicted to drugs. From this record, it is clear that the agents would have arrested and the Government would have prosecuted the husband of Ms. Fridman or his ninety year old father, had, by chance, either of them been the person to open the door and accept the delivery intended for Alex Shapiro. In short, the record is abundantly clear that what concerned the Government was to produce an arrest, with total indifference as to whether the person arrested was guilty of a crime or not.

A search of the apartment also produced random documents, including copies of Federal Express airbill receipts, dated August 10 and 11, 1988 from one Anna Weiss, at 2940 West 21st Street, Brooklyn, New York to Gennady Fridman, Ms. Fridman's son, in Bangkock, as well as drafts of the authorization from Mr. Shapiro.

There was no evidence as to the identity of Anna Weiss, nor as to the content of the packages sent by Anna Weiss to Ms. Fridman's son in Bangkock. Indeed, even the most furtile of imaginations could not conjure up a scenario that the delivery to Gennady in Bankcock could have been contraband. Yet, all

of these documents were introduced into evidence to mislead the jury into believing that they were dealing with a massive drug ring.

The delivery of the drugs, as well as a series of uninvestigated phone calls and documents, innocent, in and of themselves, as well as the drug paraphernalia belonging to Gennady, the son of Ms. Fridman, was the entire basis for the Government's claim that she had intent to possess and distribute drugs.

Ms. Fridman testified on her own behalf that in 1985, she came to the United States from Russia, with her husband, Semyon, her son, Gennady and her husband's elderly parents. She further testified that her son had made two trips to India and to Thailand, the last trip to Thailand being in July of 1988. Gennady told her that he was joining his friend Alex Shapiro in a business dealing in Oriental art and antiques.

She explained her overseas telephone calls with her son, as a mother's concern. She stated that his son's girlfriend was Anna Weiss and that he requested that two books, a dictionary and a technical jewelry manuel be sent to him, which she did in Anna Weiss' name, by Federal Express.

Her son telephoned that he was sending her four Federal Express packages, for Alex Shapiro.

She opened the packages out of curiosity. When she heard violent banging against the door, she dialed 911 for police assistance. She admitted seeing a pipe in her son's room, but thought it was some kind of lamp. She thought the scale was for her son's jewelry business.

She also, like most people, did not know what were the cutting agents in her son's room. She absolutely denied that she knew heroin was in the packages and not a scintilla of evidence was produced to the contrary.

The first trial ended in a hung jury, with ten jurors voting to

acquit.

Therefore, she was brought to trial again. This time, the prosecutor became more aggressive and still more unethical. He argued to the jury that the telephone number in Massachusetts belonged to her drug connection in Lynn. The fact is that it belonged to members of her family, that had recently emmigrated from Moscow in Russia on July 1, 1988. As a matter of fact, Lev and Faina Skuratovsky and their children, Dmitry, age 10, Ilya, age 9 and Vera, age 5 had arrived from Moscow, little more than one month before the incident herein and resided at 56 Sachem Street, Lynn, Massachusetts. The mother-in-law of Ms. Fridman was the sister of the father of Lev Skuratovsky and the communication between the parties was concerning family matters and the welcoming of a new family members into the country. It is difficult to believe that a prosecutor with all of the resources of the Government could not have learned this. If AUSA Sheridan did not know it, it was because of his conscious avoidance of the truth. If he knew it, what he did was unforgivable.

The failure of defense counsel, Frank A. Lopez to produce evidence of the identity of the Skuratovsky family and their recent entry into the country was gross incompetence.

Thus, Assistant United States Attorney Sheridan argued on summation in the second trial, concerning the phone calls to Lynn, Massachusetts, that they were made in furtherance of a drug conspiracy, despite the absence of evidence as to their content and as to the identity of the persons to whom, they were made, as follows:

> "These calls are about drugs, ladies and gentlemen, and they are about how Gennady Fridman is going to bring them and how they are going to be distributed here in Brooklyn. and how Dora Fridman and Alex Shapiro

> and others yet unknown are going to distribute the heroin in the United States."

Yet, the record is clear that AUSA Sheridan never even investigated the identity of the persons in Massachusetts that Ms. Fridman telephoned, as if he were fearful that if he did, his speculations to mislead the jury would disappear. Sheridan further argued:

> "Late in the afternoon she's in Coney Island getting the statement notarized. Followed eleven minutes later by a phone call to Nahant Massachusetts The pattern of those phone calls showed that Dora Fridman was involved with these drug dealers from July of 1988 through August of '88 when she was arrested. That's what pattern of phone calls show. No multiple choice exam."

Again, the persons in Lynn, Massachusetts that she telephoned were family members, newly arrived from Moscow, which AUSA Sheridan refused to investigate, since he knew it was highly unlikely that a fifty four year old woman, living in poverty, was dealing in drugs. He consciously avoided learning the identity of the persons residing in Lynn, Massachusetts.As for the persons in Nahant, Massachusetts, it was her husband who made those calls, not her.

The second trial ended in a conviction. The explanation for the radically variant result, is that in the second trial, AUSA Sheridan brazenly urged the jury that Ms. Fridman was involved in a drug distribution conspiracy, centered in Lynn, Massachusetts, an argument that he was not brazen enough to make in the first trial.

Unfortunately, he managed to get away with it, by the

inertia of Ms. Fridman's attorney, Frank Lopez, who failed to object to this bad faith argument on summation by the prosecutor, on the common sense grounds that it simply was not supported by the evidence and certainly had not been investigated by the Government.

Indeed, it was ineffective assistance of counsel in violation of the Sixth Amendment, that also contributed to the conviction and enabled AUSA Sheridan to get away with his outrageous summation. Thus, it was unforgiveable for Mr. Lopez to have failed to produce the recent arrivals, Len Skueratovsky and his wife Faina, the cousins of Ms. Fridman, to clear the air that they certainly were not drug dealers and had not even been investigated by the Government, to determine whether they were.

The trial was interrupted for one day, as a result of an unexplained illness by defense counsel, Frank A. Lopez. Throughout the trial, he kept falling asleep and snoring out loud. During summation, he totally lost his trend of thought, urging as follows:

> "Now, no one claims that a person who is importing kilos of heroin is in the business of selling hypdermic needles. That's absolutely ridiculous. Nor does anyone claim that Dora Fridman is a user of heroin. That is absolutely ridiculous. No one claims that there is any needle marks on the body of Dora Fridman. . . ."

This argument on summation by Mr. Lopez reflects confusion and loss of thought trend, with defense counsel conceding that his client imported, not only the grams of heroin charged, but "kilos", as well, but that she does not sell hypodermic needles. Coupling this absurd concession by defense counsel, with the claim of the Government that Ms.

Fridman's cousins in Lynn, Massachusetts were drug distributors, was enough to change the verdict in the second trial, from near victory in the first. No doubt, AUSA Sheridan left the courtroom, tongue in cheek, proud that he had sent an innocent woman to prison.

Following the verdict of guilt in the second trial, Ms. Fridman was sentenced to a term of seventy two months incarceration and five years special parole, which conviction was affirmed by the United States Court of Appeals for the Second Circuit. Ms. Fridman then, while on supervised release, filed a post conviction motion pursuant to 28 U.S.C. 2255 to vacate the conviction, which the trial court denied, the decision being annexed, as Appendix A. The decision was affirmed by the United States Court of Appeals, annexed as Exhibit B. The application for rehearing and *en banc* consideration, was denied, annexed as Exhibit C.

REASONS FOR GRANTING THE WRIT

This petition presents an issue that has widespread public interest, to wit, to invoke the Supreme Court's supervisory power over abuse by Federal prosecutors, who literally create crimes, resorting to speculation and entrapment, in order to keep their office case load inventory high. It is a widespread policy, especially in the Southern and Eastern Districts of New York, for federal prosecutors to use nets to draw in prospective defendants, indifferent to issues of guilt or innocense.

The techniques include entrapment and enlargement of the circle of culpability to drag in as many as possible. The victims of this foul play are alway immigrants and poor minorities, incapable of marshalling the resources needed for such a defense. Thus, in the case at bar, there is no doubt that a crime

was committed by some unidentified person, that sent a substantial amount of heroin to the United States for distribution.

The Government was indifferent as to the identity of the person, that sent the drugs or the intended recipient, since such investigation would be time consuming and require effort.

Moreover, it might well rob the United States Attorney for the Eastern District of jurisdiction to prosecute, were investigation to take the case out of New York State. The Government was totally indifferent to the identity of the person, that the sender intended tc be the receipient and distributor of the contraband.

Instead, the Government, with indifference to the issue of innocence or guilt, targeted the first person that touched the package, that the Government, itself, delivered. Had by chance, Ms. Fridman's husband, father-in-law or mother-in-law answered the doorbell, undoubtedly that person would have been the one arrested. When the first jury rejected the indifference of the Government, as to innocence or guilt, AUSA Sheridan, in the second trial, pulled out his secret weapon - lies. This was his unsupported claim that no matter who Ms. Fridman was telephoning in Lynn, Massachusetts, these had to be the drug distributors. The Government brought this prosecution without any investigation, whatsoever, indifferent to issues of guilt or innocence. The Government was unconcerned with the identity of the person who sent the narcotics and indifferent to the recipient. The bank accounts of Ms. Fridman were modest, with no unexplained sums. Nothing ever pointed to her as a drug dealer. What AUSA Sheridan knew was that she was a poor immigrant in this country only three years, and vulnerable. That was enough for him. The jury was invited to speculate away her liberty, accepting the bad faith claim by UASA that she was

distributing narcotics to Lynn, relying upon the integrity of the United States Government, that was sadly abused.

More than one half century ago, the Supreme Court, in *Berger v. United States,* 295 U.S. 78, 70 L.Ed. 1314 (1935), warned prosecutors "to refrain from improper methods calculated to produce a wrongful conviction." This Court issued its own "Rules of the Ring", writing that while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." Sixty five years have passed, with the admonition of *Berger* fading, while a new species of prosecutor has emerged with a doctrine of *laissez-faire,* meaning, let the accused beware. Most Government cases are not the product of investigation of crime, but rather, the creation of crime, by acts of entrapment and invitations to juries to speculate. This widespread policy of prosecutorial misconduct in violation of the Fifth Amendment right to due process of law, which is at war with *Berger,* is begging for Supreme Court review, for condemnation.

Indeed, even after learning of the innocence of the Lynn, Massachusetts telephone calls, the Eastern District of New York continues to urge the Courts to deny the petition, when all of the evidence points to the dreadful mistake it made.

Proving that one Constitutional violation flows into another, this Court should review the performance of Frank A. Lopez, Esq., that failed to meet Sixth Amendment requirements.

Indeed, had Mr. Lopez set out to protect Ms. Fridman, what occurred could not have. Thus, being chosen for conviction for merely answering a doorbell, supported by meaningless and distorted communications, innocent documents and family phone calls, occurred due to the inertia of Frank Lopez, who could have crushed the prosecution's case, by objecting to the introduction into evidence of meaningless and uninvestigated communications, the only support for the

charges. Nor did he produce the Lynn, Massachusetts residents, Lev and Faina Skuratovsky as witnesses, to demonstrate that they were newly arrived immigrant-family of Ms. Fridman and that they were never questioned by Government agents, to put the fatal stamp of doom on a case that should have been doomed as soon as it showed its ugly head. Finally, when AUSA Sheridan summed up to condemn Ms. Fridman as being in conspiracy with the Lynn, Massachusetts family to distribute narcotics, not a word of objection came from Frank A. Lopez, that there was no evidence to support such claim. The inertia of Frank Lopez, failed to meet Sixth Amendment standards, which certainly prejudiced defendant. AUSA Sheridan grew bolder as the trial progressed, aware that Frank Lopez, no matter what his motive or the cause, had chosen to abandon his client and allow her to lose her liberty for a crime that she never committed. His performance vindicates the speech of former Chief Justice Warren E. Berger, when the latter stated that half of the lawyers practicing are incompetent. If anything, the Chief Justice understated the problem, that this Court should address. The *Gideon v. Wainwright,* rule that a defendant in a criminal case has a Constitutional right to counsel, becomes illusory where the Courts tolerate counsel that prejudices his own client by his inept performance. In this case, there was a total breakdown of the adversary process. *United States v. Cronic,* 466 U.S. 648, 80 L.Ed.2d 657 (1984)

CONCLUSION

IF EVER A CASE WERE BEGGING FOR CERTIORARI, IT IS THIS ONE

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

DORA FRIDMAN, 94-CV-1912(RR)

Plaintiff,

-against-

Memorandum and

UNITED STATES OF AMERICA, ORDER

Defendant.

----------X

APPEARANCES:

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RAGGI, District Judge:

Dora Fridman moves to vacate the judgment of conviction entered against her by this court on June 21, 1989. *See United States v. Fridman,* 88 CR 514 (RR). Ms. Fridman was twice tried on charges of conspiring to possess heroin with the intent to distribute it, *see* 21 U.S.C. § 841 (1994), and importation of heroin, *see* 21 U.S.C. §§ 952(a), 960 (1994). When the first jury to hear the evidence against her could not reach agreement on a verdict, a mistrial was declared. After a second trial, at which Ms. Fridman was found guilty on all three charges, this court imposed concurred sentences of 72-months' incarceration and a five-year term of supervised release. With the assistance of new counsel, Ms. Fridman appealed, challenging the sufficiency of the evidence as well as various instructions given by the court. The Court of Appeals rejected these arguments and affirmed Ms. Fridman's conviction in a summary order, familiarity with which is assumed. *See United States v. Fridman*, No. 89-1359 (2d Cir. Dec. 1, 1989) (disposition reported at 895 F.2d 1411 (2d Cir. 1989) (table)).

Over four years later, Ms. Fridman filed the instant motion to vacate her conviction pursuant to 28 U.S.C. § 2255 (1994), supporting her claim with a rambling 114-page memorandum. In opposing the motion, the government discusses Ms. Fridman's myriad arguments as they fit into three broad categories: (1) deception on the part of the prosecutor, (2) incompetence on the part of her retained attorney, and (3) legal errors committed by the trial court. As the government correctly observes, because Ms. Fridman had finished serving her term of incarceration when she filed her petition, the motion is not properly considered pursuant to 28 U.S.C. §§ 2255. At best, it might be viewed as a petition for a writ of error *coram nobis* under the All Writs Act, 28 U.S.C. § 1651(a)(1994). *See Nicks*

v. United States, 955 F.2d 161, 166-67 (2d Cir. 1992). As the Court of Appeals explained in *Nicks*, however, "[r]elief under the writ [of error *coram nobis*] is limited in scope" to cases "where extraordinary circumstances are present." *Id.* (and cases cited therein). The government assumed *arguendo* that such circumstances might be found in the fact that Ms. Fridman was then still subject to supervised release. The following year, however, Ms. Fridman's declining health prompted this court to grant early termination of supervision. Since Ms. Fridman asserts no other present adverse consequences of her conviction warranting *coram nobis* relief, it may be appropriate to dismiss her petition as moot. *See generally Blanton v. United States*, 94 F.3d 227, 232-33 (6th Cir. 1996) (discussing the various circuit holdings on whether an ongoing civil disability is a requirement to *coram nobis* relief). Even if this court were to conclude that Ms. Fridman's motion was not moot, she would not be entitled to have her conviction vacated substantially for the reasons stated by the government in its excellent opposition memorandum. The court writes briefly only to emphasize its agreement with the points made in that submission.

Factual Background

1. The Prosecution's Evidence Against Dora Fridman

In presenting its case, the prosecution relied on testimony from various federal agents, which revealed that on August 20, 1988, United States Customs officials in Portland, Oregon discovered a substantial quantity of heroin secreted within a cloisonne vase and a metal sword scabbard being shipped from Bangkok, Thailand to one Alex Shapiro at 2940 West 21st Street, Apt. 4-Z, Brooklyn, New York.

Federal agents in New York decided to attempt a controlled delivery of the seized items and toward that end, on August 23, 1988, placed a tape-recorded telephone call to the

addressee apartment in Brooklyn. Petitioner Dora Fridman answered the call and, thinking she was speaking to a delivery dispatcher, identified herself Alex Shapiro's sister. After first stating that Shapiro was home, Ms. Fridman subsequently stated that he was at work but had asked her to received the package. Later that afternoon, agents observed Ms. Fridman in the company of an older gentleman at the neighborhood office of a notary public. There the man signed the name "A. Shapiro" in Russian characters to a statement that read: "I, Alex Shapiro - 2940 W. 21 STR. Brooklyn, N.Y. 11224 agree to trust to Dora Fridman - 1610 43 Str. Apt. C-6, Brooklyn, N.Y. 11224 to receive the packages, w[h]ich will come under my name 08.23. 1988." Subsequent investigation revealed that this statement was in Ms. Fridman's handwriting.

Shortly after noon on the following day, August 24, 1988, federal agents dressed as delivery men went to the West 21st Street apartment. Ms. Fridman admitted them to the premises, this time identifying herself as Shapiro's cousin. She explained that Shapiro was in Florida and showed the notarized document authorizing her to accept the packages. After the agents placed the packages in a rear bedroom as Ms. Fridman requested, they left the apartment and maintained surveillance from outside the building.

A subsequent check of telephone records revealed that from August 20, 1988, when agents seized the "Alex Shapiro" packages, to August 24, 1988, when they delivered them to Ms. Fridman, numerous telephone calls were placed from the addressee apartment to telephone numbers in Massachusetts and India. The records would further show numerous collect telephone calls from Thailand to the addressee apartment.

At approximately 11:25p.m., a beeper concealed within the package containing the vase alerted surveillance agents that someone had attempted to open the parcel. Having procured an

anticipatory search warrant, the agents returned to the apartment, knocked, identified themselves, and demanded admittance. Receiving no response and hearing shuffling noises inside, the agents forcibly entered the premises and arrested Ms. Fridman.

In executing the search warrant, agents found, in addition to the packages containing the vase and the sword, quantities of procaine, quinine, and lactose, substances frequently used as narcotic diluents. They also found narcotics paraphernalia, including an Ohaus triple-beam balance scale, a water pipe, and several hypodermic needles. The agents seized copies of Federal Express waybills, dated August 10, and 11, 1988, reflecting shipments from "Anna Weiss" at the addressee apartment of Gennady Fridman in Bangkok, Thailand.

After being advised of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 486 (1966), Ms. Fridman identified Gennady Fridman as her son. She claimed that he was at work in Brooklyn and could not be contacted. This was untrue. As Ms. Fridman would admit at trial, her son was out of the Untied States on August 24, 1988. Indeed, he remains a fugitive to this day. At the time of her arrest, Ms. Fridman also initially stated that Alex Shapiro was her cousin and described him as a short, slender, 30-year old male with brown hair. Subsequently, she stated that Shapiro was a friend of her son and was fifty to sixty years old. Ms. Fridman stated that Shapiro had given her $10 the day before to accept the packages for him, after which he had left for an unknown location in Florida. When Ms. Fridman was questioned about the "Anna Weiss" waybills, she denied knowing anyone by that name. At trial, the government would prove that Ms. Fridman had herself filled out these waybills. At the time of her arrest, Ms. Fridman also denied any knowledge of the drug paraphernalia in the apartment.

2. The Defense Case

The crux of the defense was that Ms. Fridman was a loving mother who, in August 1988, was concerned about the activities of her adult son, Gennady. She did not know that drugs were concealed in the two packages delivered to her on August 24, 1988. Much less did she have any intent to traffic in those drugs. In support of this theory, Ms. Fridman testified in her own defense.

She stated that she had emigrated with her husband, son, and in-laws from the Soviet Union to the United States in 1981. She described her son Gennady as a taxi driver and artist who, in July 1988, had traveled to Thailand to meet his friend Alex Shapiro to purchase Oriental art and antiques. She explained that her son frequently called her collect from Thailand simply to assure her of his safety. Ms. Fridman furthr testified that on August 9, 1988, her son requested that she sent him a dictionary and a jewelry manual that his girlfriend, Anna Weiss, was keeping for him. She explained that she had to send the books separately, one on August 10, 1988, the other on August 11, 1988, because she did not have enough money with her on the first dated to cover the shipping cost for both items. She admitted using Anna Weiss's name on the waybills.

Ms. Fridman testified that on August 18, 1988, her son called to tell her that he was traveling on to India but he would be sending two Federal Express packages to Alex Shapiro. On August 20, 1988, he called again to provide her with the number where he could be reached in India. Ms. Fridman asserted that it was on August 20, when she was cleaning her son's room, that she found the hypodermic needles subsequently seized by the agents. She placed the needles in a bag and hid them in her own room, intending to confront her son on his return.

Ms. Fridman testified that she saw Alex Shapiro several

times in July and August of 1988. She stated that on August 19, 1988, he asked her to accept the Federal Express packages being sent to him by her son. She reluctantly agreed only because she wanted ascertain what her son was doing with Shapiro. On cross-examination, she stated that her Massachusetts telephone calls were to Alex Shapiro. She further admitted lying to the agents/delivery men about her relation to Shapiro, explaining that she had wanted them to give her the packages. She testified that she twice called her son in India after receiving the packages, but was unable to reach him. Her maternal suspicions further aroused, she began to open the boxes. Soon thereafter she heard banging at the door. Alarmed, she attempted to dial 911 when the agents burst into the apartment and placed her under arrest.

Ms. Fridman admitted lying to the arresting agents about her son's whereabouts, but denied making any statement to them regarding Anna Weiss or the waybills using the name. She similarly denied ever describing Alex Shapiro as 30-years old. She said she thought her son's water pipe was some sort of lamp, that the scale was for use in his jewelry business, and that the bottles of chemical diluents contained paint for use in his artwork.

Discussion

I. Claims Raised on Direct Appeal

On direct appeal, Ms. Fridman challenged the sufficiency of the evidence supporting her conviction and various aspects of the court's instructions to the jury. Although these arguments were rejected on the merits by the Court of Appeals, *see United States v. Fridman*, No. 89-1359, Ms. Fridman presents them anew to this court. Indeed, her sufficiency challenge is the main point of her petition. The law, however, is well established that a petitioner cannot seek

collateral review of claims already raised and decided against her on direct appeal. *See United States v. Perez*, 129 F.3d 255, 260 (2d Cir. 1997); *Barton v. United States*, 791 F.2d 265, 267 (2d Cir. 1986). Accordingly, this part of Ms. Fridman's motion is rejected as procedurally barred.

II. Claims Not Raised on Direct Appeal

Ms. Fridman's remaining claims regarding misuse of evidence, unlawful searches, impermissible post-arrest questioning, ineffective assistance of counsel, and judicial bias, are, for the most part, based on the record as it existed at the time of her direct appeal. As a rule, a petitioner's failure to raise a claim on direct appeal constitutes a procedural default and ensuing prejudice. *Douglas v. United States*, 13 F.3d 43, 46-47 (2d Cir. 1993); *Campino v. United States*, 968 F.2d 187, 190 (2d Cir. 1992). While an exception is made for Sixth Amendment claims of ineffective assistance of trial counsel where the same attorney represents a party both at trial and on appeal, that does not apply in Ms. Fridman's case since she retained new appellate counsel who had no conflict in arguing the ineffectiveness of his predecessor. *See Douglas v. United States*, 13 F.3d at 47. Ms. Fridman nevertheless seeks to avoid dismissal of her petition on grounds of procedural default by submitting that her appellate attorney was also constitutionally ineffective.

The law is well establishes that a petitioner asserting a claim of ineffective assistance of counsel must demonstrate both (1) that counsel's performance was so unreasonable under prevailing professional norms that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and (2) that counsel's ineffectiveness prejudiced the defendant such that "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. *Accord, United States v. Trzaska*, 111 F.3d 1019, 1029 (2d Cir. 1997). When applied to a challenge to the representation afforded by appellate counsel, *Strickland* requires a petitioner to show that "counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker," *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994), and that "there was a 'reasonable probability' that [the omitted claim] would have been successful before the [appellate court]," *id.* at 534 (quoting *Claudio v. Scully*, 982 F.3d 798, 803 (2d Cir. 1992)). In applying this test to a particular case, a reviewing court must bear in mind that appellate counsel is not required to raise every colorable claim of error, even if requested to do so by a client. *See Jones v. Barnes*, 463 U.S. 745, 754 (1983). Indeed, one of the crucial strategic tasks that must be performed by an effective appellate advocate is to isolate out of a voluminous trial record the few key issues most likely to persuade a reviewing court to reverse and not to bury these "in a verbal mound made up of strong and weak contentions." *Jones v. Barnes*, 463 U.S. at 753; *see also see Strickland v. Washington*, 466 U.S. at 689 (reviewing court must indulge "a strong presumption" that counsel's strategic choices fall "within the wide range of reasonable professional assistance," (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955))).

Ms. Fridman cannot satisfy the strict requirements of *Strickland* for the simple reason that none of the claims omitted by appellate counsel has merit.

A. Ineffective Assistance of Trial Counsel

Ms. Fridman's primary complaint about appellate counsel is that he failed to argue the constitutional ineffectiveness of trial counsel. Since a challenge to trial

counsel's performance, like a challenge to appellate counsel's performance, is governed by the strict two-prong *Strickland* test already discussed *supra*, and since Ms. Fridman cannot satisfy either part of that test with respect to her trial counsel, this aspect of her petition must be rejected as without merit.

Preliminarily, the court notes that trial counsel's purported omissions are properly reviewed in the context of his overall performance. *See Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986); *United States v. Uguirre*, 912 F.2d 555, 561 (2d Cir. 1990) (counsel's general demonstration of preparation and competence carries significant weight" in reviewing a Sixth Amendment claim). As the government painstakingly demonstrates in its brief, Ms. Fridman's counsel, an experienced defense lawyer with a respected reputation in this court as an outstanding cross-examiner and skillful jury advocate, vigorously represented his client throughout two trials, securing a hung jury at the first. Throughout these proceedings, counsel's legal challenges were sharply focused, his questioning of witnesses characteristically skillful, and his closing arguments cogent and forceful. In this context, none of the alleged omissions evidence constitutionally ineffective assistance.

For example, Ms. Fridman claims that counsel erred in summation when he argued that the issue in the case was "more" than whether his client knew that the packages contained heroin. As a review of the full summation shows, counsel vigorously argued that the government had not met its burden of proof on the issue of whether his client knew or suspected that the packages contained heroin. Having made this point, he *further* argued that the government's burden involved "more" than proof of guilty knowledge. It also required proof of specific intent to commit the charged crimes. This was an accurate statement of the law and plainly in his client's best

interest.

Neither was counsel deficient in failing to challenge the court's instruction on circumstantial evidence, which parallels the pattern instruction found at 1L. Sand, et al., *Modern Federal Jury Instructions*, Inst.5-2 (2000). Ms. Fridman's reliance on *United States v. Morales*, 577 F.2d 769 (2d Cir. 1978) is misplaced. As the government correctly observes, in *Morales*, the Court of Appeals was concerned with an error in an instruction on state of mind, not with any distinction between circumstantial and direct evidence.

Ms. Fridman faults counsel for not securing telephone records to corroborate her testimony that she was calling 911 when agents burst into her apartment. She further complaints that counsel did not call the agents who first entered her apartment to testify to the fact that she was on the telephone at that moment. In fact, Ms. Fridman fails to demonstrate that any documentary evidence of an incomplete call ever existed, much less that the entering agent would have offered helpful testimony. As the government points out, Agent Lazzara, who was among the first agents to enter the apartment, testified that Ms. Fridman was standing "inside the foyer" at the time of entry, not that she was placing a telephone call. (Trial Trans. 128).

Ms. Fridman complains that counsel failed to establish that the hypodermic needles found in her apartment were used and dirty, thereby corroborating her testimony that she found them in her son's room and was concerned about his possible abuse of drugs. The government correctly notes that since the needles were in evidence, the jury could observes their condition for itself. In any event, defense counsel in summation strongly argued that the hypodermic needles were irrelevant to the charges in the case in the case since an importer of large quantities of heroin from aboard would not be likely to deal in

the few hypodermic needles found in the apartment. It was well within counsel's strategic discretion to use this tactic to deal with the issue of the hypodermic needles rather than to spar with the prosecution over the circumstances of any use.

Similarly within counsel's broad strategic discretion was his decision about how to cross-examine Agents Knight and Clinton regarding Ms. Fridman's post-arrest statements. Rather that suggest that these agents had lied about Ms. Fridman's statements, as petitioner now asserts he should have, trial counsel chose to dismiss any apparent inconsistencies as the product of his client's poor English and her agitation over the affairs of her son and the agents' forcible entry into her apartment. This was an objectively reasonable tactic to divert attention from harmful evidence and, as such, did not constitute ineffective assistance. *See, e.g., United States v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir. 1987) (holding that "decisions whether to engage in cross-examination, and if so to what extent and in what manner are ... strategic in nature" and entitled to deferential review under *Strickland*).

Ms. Fridman faults trial counsel for failing to object to expert testimony regarding wholesale drug prices and drug paraphernalia. In fact, the Second Circuit has expressly recognized that matters relating to drug weight, price, and use are "beyond the ken of the average juror" and, therefore, and appropriate subject for expert testimony. *United States v. Tapia-Ortiz*, 23 F.3d 738, 740-42 (2d Cir. 1994). Further, this court carefully instructed the jury as to how expert testimony should be weighed. (Trial Trans. 374-75)

Ms. Fridman complains that trial counsel was deficient in failing to offer evidence that her telephone calls to Lynn, Massachusetts, were to a relative, Lev Skuratovsky. In support, she offers an affidavit from Mr. Skuratovsky. The problem with this claim is that Ms. Fridman expressly testified at trial that the

Lynn telephone calls were to Alex Shapiro. (Trial Trans. 269). Counsel can hardly be found constitutionally ineffective for failing to expose his clients perjury. Neither can the government be held to have denied petitioner due process by failing to impeach her testimony.

Ms. Fridman asserts that counsel was constitutionally ineffective in stipulation to the type and quantity of drug found in the seized packages. She points to discrepancies in the 640-gram weight noted in the initial seizure report, the case agent's grand jury estimate of a one-half pound seizure, and the laboratory report of 393 grams to which the parties stipulated. As the government sensibly points out, the initial report notes the gross weight of the contraband seized, whereas the laboratory report confirms the drug type and provides its net weight. As for the agent's grand jury testimony, it was simply a conservative projection of the net weight. Under these circumstances, it was certainly not objectively unreasonable for experienced defense counsel to stipulate to the laboratory's findings as to drug type and weight and to focus his defense on weaker elements of the government's case, specifically, the issues of knowledge and intent.

Finally, Ms. Fridman complains of her attorney's failure to call her neighbor Felix Shabsis as a witness to challenge the agents' forcible entry into her apartment. In fact, the affidavit from Mr. Shabsis now submitted by petitioner indicates that he heard agents identify themselves a few seconds before they entered the apartment. Since this is not inconsistent with the agents' testimony at the suppression hearing, petitioner has failed to show that counsel's purported omission adversely affected the outcome of her case.

Petitioner having failed to demonstrate that her trial counsel's representation was in any way constitutionally deficient, she cannot contend that her appellate counsel was

ineffective for failing to raise a Sixth Amendment challenge on direct appeal.

B. Prosecutorial Misuse of Evidence

Ms. Fridman faults her appellate counsel for not challenging the prosecutor's misuse of evidence at her trial. This argument is really a variation on her unsuccessful appellate claim that the evidence adduced was insufficient to support a finding of guilty. Ms Fridman reworks that claim to argue that many of the prosecutions's witnesses were not credible and that certain physical evidence was not reliable. These, however, were matters for the jury to consider, and reviewing court, whether on direct appeal or collateral challenge, must assume that any disputes were resolved in favor of the prosecution. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *accord Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (habeas court cannot redetermine the credibility of witnesses); *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998) (reviewing court must defer to jury's determinations of the weight of the evidence and the credibility of witnesses). Thus, appellate counsel cannot be faulted for failing to challenge evidence on grounds that would clearly have been rejected by the Court of Appeals.

Ms. Fridman further complains that certain evidence was either irrelevant or violative of Rule 404(b) of the Federal Rules of Evidence, specifically: (1) the "Anna Weiss" waybills, (2) certain Federal Express guides, (3) ticket receipts from her own 1988 trip to India, (4) credit card and checking records, (5) address books, (6) a sales receipt from a New York store showing Gennady Fridman's June 1988 purchase of the cloisonne vase used to ship heroin from Thailand in August of that year, (7) a news clipping found in Gennady Fridman's room reporting on a death sentence imposed in Thailand on a

heroin smuggler, and (8) letters from Dora Fridman's room. A careful review of the records indicates that all of these exhibits were used to prove the charged conspiracy and Ms. Fridman's knowing and intentional participation therein. None constituted evidence of other crimes or wrongs, much less other crimes offered simply to establish the bad character of the accused as is prohibited by Rule 404(b). In sum, the prosecutor's proffer of this evidence and the court's receipt of it were neither erroneous under the Federal Rules of Evidence, nor violative of the Constitution's due process guarantee of a fair trial. Because this claim is so patently lacking in merit, appellate counsel's failure to raise it cannot support Ms. Fridman's motion to vacate her conviction.

C. Court Error and Bias

Ms. Fridman faults appellate counsel for not challenging this court's adverse ruling on her pre-trial motion to suppress her post-arrest statements on the grounds that they were obtained in violation of the holding in *Miranda v. Arizona*, 384 U.S. 486. This court has reviewed the record of the suppression hearing and remains convinced, for the reasons originally stated, that the statement were not procured in violation of *Miranda* or the constitutional right against self-incrimination. Thus, this claim must be rejected both procedurally defaulted and lacking in merit.

A similar conclusion applies to petitioner's assertion that this court was biased against her at sentencing based on its conclusion that she had testified falsely at trial. Of course, it was the jury, by its verdict, which first found Ms. Fridman's testimony to be false. This court simply endorsed those views at sentencing. The fact that a judge forms an adverse opinion about a testifying defendant's credibility does not evidence the sort of bias that requires recusal, much less a new trial. As the

Supreme Court has observed:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed toward the defendant ... [b]ut the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings ....

Liteky v. United States, 510 U.S. 540, 550-51 (1994) Ms. Fridman's appellate counsel cannot be faulted for failing to raise an unmeritorious claim of judicial bais.

Conclusion

Although it appears that Ms. Fridman's petition to vacate her conviction be moot, even if this were no so, her petition would have to be denied. The court finds, for the reasons stated herein as well as those set forth in the government's opposing memorandum, that petitioner's claims are almost all procedurally barred and, in any event, lacking in merit. Having disposed of the petition on the papers, the court hereby denies Ms. Fridman's motion for appointment of counsel. The Clerk of the Court is to note that the petition is denied as well as a certificate of appealability. The case is to be marked closed.

SO ORDERED.

Dated: Brooklyn, New York
May 17, 2001

s/
REENA RAGGI
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSE OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24th day of April, two thousand two.

PRESENT: HON. JAMES L. OAKES,
HON. DENNIS JACOBS,
HON. GUIDO CALABRESI,
Circuit Judges.

----------X

DORA FRIDMAN,

Petitioners-Appellant,

-v-

UNITED STATES OF AMERICA,

Respondent-Appellee.

----------X

APPEARING FOR APPELLANT: LEON SEGAN, New York, NY (Dora Fridman, pro se, on the brief).

APPEARING FOR APPELLEE: PETER A. NORLING, United States Attorney's Office for the Eastern District of New York, Brooklyn, NY (Alan Vineyard, United States Attorney, and Cecil C. Scott, Assistant United States Attorney, on the brief).

Appeal from the United States District Court for the Eastern District of New York (Raggi, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED ADJUDGED AND DECREED that the judgment of the district court be *AFFIRMED.*

In this appeal from the district court's denial of her § 2255 petition, Fridman, *pro se* but represented by counsel at

oral argument, asserts that her conviction and sentence should be vacated because (1) the court was biased at trial and sentencing; (2) the court improperly admitted evidence of certain documents and the expert testimony of a government agent; and (3) Fridman's counsel at trial and sentencing was ineffective.

The district court was of the view that Fridman did not satisfy the "in custody" requirement of 28 U.S.C. § 2255 because at the time the motion was considered Fridman was no longer in custody, and that since her term was over the motion was likely moot. However, she was in custody when the motion was filed, which suffices. *See Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). And the case did not become moot when Fridman's term of supervised release ended. *See United States v. Probber*, 170 F.3d 345, 348 (2d Cir. 1999).

We therefore proceed to the merits, as did the district court. We have considered all of plaintiff's contentions, and we affirm the judgment of the district court for substantially the reasons stated in Judge Raggi's Memorandum and Order entered on May 22, 2001.

For the reasons set forth above, the judgment of the district court is hereby *AFFIRMED*.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
By:

s/
Lucille Carr, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27th day of September two thousand two.

PRESENT: HON. JAMES L. OAKES,
HON. DENNIS JACOBS,
HON. GUIDO CALABRESI,
CIRCUIT JUDGES, 2nd Cir.

DORA FRIDMAN,
Petitioner-Appellant,

V.

UNITED STATES OF AMERICA,
Respondent-Appellee.

A petition for panel rehearing having been filed herein by appellant Dora Fridman,
Upon consideration thereof, it is
Ordered that said petition be and it hereby is *DENIED*.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: s/
Art Heller
Administrative Attorney

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p/o/AA